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No. 99-1647

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN TARGET ADVERTISING, INC.,
Petitioner,

v.

FRANCINE A. GIANI, DIRECTOR,
UTAH DIVISION OF CONSUMER PROTECTION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SECOND SUPPLEMENTAL BRIEF

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September 19, 2000

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SECOND SUPPLEMENTAL BRIEF FOR THE PETITIONER

Pursuant to Supreme Court Rule 15.8, petitioner American Target Advertising, Inc. ("ATA") files this Second Supplemental Brief.

On September 13, 2000, ATA became aware of a proposal by the National Association of Attorneys General/National Association of State Charitable Officials ("NASCO") to require licensing of Internet fundraising activities. ATA became aware of the proposal through an article in the September 7, 2000 issue of *The Chronicle of Philanthropy*. The proposal, called the "Charleston Principles," was first posted on the NASCO web site on or about September 5, 2000. See, www.nasconet.org/stories/storyReader$10, attached hereto at Appendix A, infra.

ATA brings this matter to the attention of the Court to illustrate that registration laws, such as the Utah Charitable Solicitations Act (the "Act") which is the subject of the present litigation, are not the least restrictive means of the accomplishing the purported purposes of such licensing laws. Additionally, the Charleston Principles demonstrate the excessive reach of charitable licensing laws, which apparently now extend to even the most benign speech placed in interstate commerce.

There are several key provisions of the Charleston Principles. Section III. B. 3. provides that "[a]n entity that solicits via e-mail into a particular state shall be treated the same as one that solicits via telephone or direct mail, if the soliciting party knew or reasonably should have known that the recipient was a resident of or was physically located in that state." Because the Act and other charitable solicitation laws require registration of consultants who provide services to nonprofit organizations that send national communications seeking voluntary contributions, consultants will need to obtain licenses in multiple jurisdictions if their nonprofit

clients engage in fundraising on the Internet. Under section III. B., entitled "Entities That Are Domiciled Outside the State," a foreign entity must register in states if "[t]he entity solicits through an interactive Web site" or "[r]eceives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site."

The practical problems associated with such requirements are numerous. Firstly, given that e-mail addresses do not show the state in which the addressee is located, entities will not know whether their Internet fundraising is taking place in a given jurisdiction. Secondly, contributions made by credit card have the same problem. The Charleston Principles do not define under what circumstances an entity should "reasonably" know when it is sending e-mails into a state or receiving contributions therefrom. Thus, entities may be subject to criminal penalties for failure to register even though they do not know the jurisdictions in which recipients of their communications may be domiciled. Such criminal sanctions are applicable to consultants who merely provide advice to organizations that post appeals for contributions on their web sites.

The Charleston Principles also illustrate that the jurisdictions that have charitable licensing laws have taken the path of most resistance under the First Amendment, the Commerce Clause and the due process clause of the Fourteenth Amendment. ATA has freely acknowledged that Virginia, the state in which ATA is located and does business, may require consultants within the state to obtain a license under constitutionally acceptable business licensing laws. Dist. Ct. App. 120. Perhaps more so than direct mail, Internet communications are the extreme example of speech in interstate commerce. The Charleston Principles, like charitable solicitation laws in general, create serious impediments to nonprofit communications, and subject organizations and their consultants to criminal sanctions for the most benign

activities. NASCO is attempting to use charitable solicitation laws as a means to further restrict First Amendment activities by placing burdensome licensing restrictions on speech on the Internet.

A less restrictive means of accomplishing the states' purported goals would be to allow entities to register in the state in which they are located under acceptable business licensing laws, and the licensing state could post such information on the Internet. Section IV. B. of the Charleston Principles readily acknowledges the capacity of states to use this less restrictive means. Instead, however, NASCO has chosen to make Internet fundraising more difficult and convoluted.

The Charleston Principles highlight the fact that these licensing laws are overly burdensome and unnecessarily restrictive of constitutional rights. They create prior restraints without regard to the time, place or manner of an activity. And the threat of criminal sanctions for unknowing violations of these laws will tend to chill First Amendment activities. With the advent of the newest and most expansive medium, the Internet, it is particularly important that the Court decide the constitutional parameters applicable to licensing laws such as the Utah Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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